Nos. 2473 and 2474

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNION STEAMSHIP COMPANY (a corporation), claimant of the American Steamship "Argyle", her engines, boilers, etc.,

Appellant,

vs.

KONSTANT LATZ,

Appellee.

BRIEF FOR APPELLEES, ABRAHAMSEN AND LATZ.

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FRANK D. MONCKTON, Clerk.

By .....*Deputy Clerk.*

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Supplemental Statement of Facts.

The amazing statement of facts made by appellant demands a supplemental statement.

There was conflict in the testimony, as there almost always is in collision cases. Upon some points, the conflict was violent. As to many of the other points, there was agreement. The following supplemental statement shows the absolute inaccuracy of some of the appellees' statements:

It is admitted that the lights of each vessel were burning brightly. There was practically no wind

and no sea. There was a haze or mist on the starboard side of the "Argyle" off to the eastward (Ap. 68, 120, 260, 305, 342, 358, 359); otherwise the night was clear.

McAlpine, the bridge officer of the "Argyle", testified:

> At the time the 'Gualala' blew one whistle she was about 960 feet away (Ap. 48, 59). When I first saw the 'Gualala', after the lookout reported her green light, she was then about inside of a mile (inside of 6080 feet, if a nautical mile was meant; inside of 5280 feet, if a statute) (Ap. 53). (Afterwards he said 1½ miles.) There was a slight alteration in the bearing of the 'Gualala' between the time I first saw her until her first whistle. When her red light was reported she had only changed her bearing one half a point (Ap. 59, 60).

Hansen, the lookout on the "Argyle", testified:

> The 'Gualala' was about 960 feet away when she blew one whistle (Ap. 127). The 'Gualala' was not more than four ship's lengths of the 'Argyle' (1280 feet) away at the time I first saw her masthead light (Ap. 126, 127). (This was the first that was seen of the 'Gualala' from the 'Argyle'.) The vessels were not quite parallel, pretty near (Ap. 122).
>
> It was about two or three minutes from the time that I first saw that light of the 'Gualala' until the two boats hit each other (Ap. 124). It was just after I had seen the 'Gualala' when she blew that one whistle. It was just an instant afterward (Ap. 127). She was about three ships' lengths away from the 'Argyle' when she blew that one whistle. I saw the 'Gualala's' red light *just after* she blew her whistle and that was just a matter of a few

> seconds before the two boats came together (Ap. 129). The whole thing happened rapidly one thing after another after I saw the masthead light (Ap. 131).

Torbjorsen, the quartermaster on the "Argyle", testified:

> "I guess about one minute elapsed between the one whistle and the three whistles" (Ap. 137, 138).

Comstedt, the lookout on the "Gualala", testified:

> "Until the whistle was blown on the 'Gualala', the 'Argyle' didn't change her position as to the bearing she was off our port bow" (Ap. 357).

The pilot house log and the ship's log of the "Argyle" show that the "Gualala" was first sighted from the "Argyle" at 2:59 A. M.; that the "Gualala" blew one whistle at 3:05, and that the collision occurred at 3:07 (see Exhibit and testimony). By the engineer's log of the "Argyle", the signal for full speed astern was given on the "Argyle" at 3:06 (Ap. 143). As the deck log shows that the collision occurred at 3:07, or two minutes after the "Argyle" blew her one whistle, this checks up the fact that the signal to reverse was not given until one minute after the one whistle.

The amazing part of appellees' statement is on page 3 of its brief. We do not understand that any of the matter set forth in the first paragraph on that page is "contended" for by any of the witnesses on the "Argyle". The only persons who

make that contention are counsel for the appellees. Most of those contentions are made in the face of the testimony of the witnesses on the "Argyle". It is contrary to all of the testimony that the "Gualala" blew a one blast passing signal, then ported her helm and turned across the course of the "Argyle", *exposing to the latter* both her side lights, then shutting out her red light, and leaving her green light alone, shortly after the "Gualala's" green light was seen from the "Argyle". Upon this point McAlpine testified:

> Shortly after sighting the 'Gualala's' green light he (the 'Gualala') blew one whistle and ported his helm, and *then* I saw his red light (Ap. 47). He did *not* see the 'Gualala's' red light *at any time* prior to the receipt of her one whistle. Saw the red light almost immediately after the receipt of that whistle. When the one whistle was blown I saw her red light for the first time. I do not know how long that red light may have been in view before the 'Gualala' blew this whistle (Ap. 60, 61, 65). He never at any time saw the two side lights at the same instant (Ap. 82, 83).

So that, while the lights were exposed in the order mentioned by appellant to the *inanimate* "Argyle", it seems far from disingenuous for appellant to state this as a fact to the court, when the officer in charge of the bridge of the "Argyle" knew nothing of these exposures.

Upon this point Hansen testified:

> That he sighted the 'Gualala's' masthead light and immediately thereafter sighted her green light; that he then saw the green light

> and the red light together, but at no time did he report to McAlpine the seeing of these two lights together; that immediately after seeing them together, he lost sight of the green light, but still saw the red one; that he did not at any time report to McAlpine the losing sight of the green light or the sighting of the red light (Ap. 123, 124).

One of the other amazing statements in this paragraph of appellant's is that the "Argyle's" engines were instantly reversed full speed astern when she exchanged one blast passing signals with the "Gualala". This is a flat contradiction of the "Argyle's" own log and of the engineer's log, both of which show that at no time was the "Argyle" slowed, stopped or backed until one minute after the "Gualala" blew one whistle; also, it is a contradiction of the "Argyle" quartermaster's testimony that

> "I guess about one minute elapsed between the one whistle and the three whistles. I got the order hard aport immediately after the one whistle" (Ap. 137, 138).

McAlpine testified that the officer on watch writes up the pilot house log for his watch, and that he never knew of any one else writing it up for him; that he does not remember whether or not he made any other entry in the pilot house log other than the entry, "2:59 lookout man reported green light on starboard bow two points". He did remember making this entry, although he did not remember making any other; that the pilot house log looked

to him as if there had been some entry there in his watch, and it had been rubbed out (Ap. 86, 87).

The entry in the "Argyle's" log book shows (see same) that after sighting the "Gualala", the "Argyle's" course was changed by half a point to port by putting her helm to starboard. McAlpine admits he gave an order to the quartermaster not to let that fellow come any closer (Ap. 79).

The "Gualala's" course, at the time she was struck, was somewhere between S. SE. and S. SW. (Ap. 316, 317, 318, 340, 346).

The "Argyle" was loaded, and in that condition it required somewhere between 4 to 8 minutes to stop her when going 8 knots an hour. As to her steering, while thus loaded, she was sluggish—slow to start, and hard to check after she got started.

It is admitted by all parties that both of the libelants Abrahamsen and Latz were not on watch at the time of the collision, but were asleep in their bunks underneath the forecastle, and received the injuries of which they complain without any fault on the part of either thereof.

Argument.

ASSIGNMENT OF ERRORS 1, 2 AND 10 ARE TOO GENERAL TO BE CONSIDERED BY THIS COURT

Rule 11, page 12, of the rules of this court provide that the assignment of errors shall set out separately *and particularly* each error asserted

and intended to be urged; and that errors not assigned according to this rule will be disregarded.

Assignments 1, 2 and 10 are, therefore, not exceptions or assignments; the particulars of the errors alleged to have been committed are not set out; the statements there are only expressions of opinion of counsel, and do not direct the court or us to any particular parts of the record. For example, assignment numbered "10" does not direct the court's or appellees' attention to any alleged fault on the part of the "Gualala". So that assignments 3, 4, 5, 6, 7 and 8 are the only ones to be considered. Similar assignments have been held to be insufficient in the cases of The Natchez, 78 Fed. 185, and The Wyandotte, 145 Fed. 321. In the former case, the court said:

> "The second assignment is that the court erred in allowing certain claims in the libel which evidence adduced by the libelant did not substantiate. The general character of this assignment relieves us of any necessity to consider it."
>
> The Natchez, 78 Fed. 185.

II.

THE COURT WILL NOT DISTURB THE FINDINGS OF THE COURT BELOW.

In these causes all of the testimony of appellants' witnesses was heard in open court, while that of some of the principal witnesses on behalf of appellees was taken by depositions, not in the presence of

the court. There is a mass of testimony in the record to support all of the findings. As to those points upon which the testimony was conflicting, the court, after seeing and hearing appellant's witnesses, chose not to believe its principal ones. We know we are speaking by the record and we think we are putting it mildly when we say that no one, after seeing and hearing McAlpine (the officer in charge of the deck of the "Argyle" at the time of the collision) testify, could have come to any other conclusion than that he was, as to many of the vital points of his testimony, entirely and utterly unworthy of belief. It will become obvious, therefore, upon reading the record, that appellant has advanced no reason why this court should violate one of its fundamental rules, the one against disturbing the findings of a trial court in such a case as this. (Alaska Packers v. Domenico, 117 Fed. 101.)

III.

THE "ARGYLE" WAS PRIMARILY AND SOLELY IN FAULT.

Upon this point, as upon all others, the "Argyle's" case must be determined principally from the testimony of McAlpine and Hansen. Never was a witness more thoroughly discredited than is McAlpine. In addition to the nature of his testimony on the stand and that given before the local inspectors of hulls and boilers, and of his manner

before the court, there is the incident of the pilot house log book, which was written into the ship's log book. It is asking too much of credulity to believe that he could remember making one entry regarding these important events and not remember whether or not he made a single other entry. Certainly in a matter of such vital importance he would have remembered. He says the log book looked to him as if other entries had been made and then rubbed out; and the conclusion is irresistible, both from his testimony and from the book itself, that the log has been tampered with; also, it must have been tampered with between the time of the accident and the time when the ship's log was written up in San Francisco after the vessel arrived there the day of the accident. These facts themselves leave the entire case of the "Argyle" under suspicion. As to his testimony and that of Hansen: It places the primary causative faults solely on the "Argyle" beyond question.

We wish to say, before going further, that throughout this brief we proceed upon the theory that the "Gualala" was first sighted by the "Argyle" a very little off the "Argyle's" starboard bow, practically dead ahead.

Appellant omits absolutely, as it did in the court below, all consideration of any of the testimony *showing the beginning of the "Argyle's" sinning.* That is, it still ignores those faults "causative of the collision". These faults were the negligence, before the exchange of the one whistle signals, of her

officer of the deck, McAlpine, and her lookout, Hansen, in:

> *Not seasonably sighting the "Gualala"; in McAlpine's assuming the two vessels were on parallel courses when there was practically no change in the bearings of the two rapidly approaching vessels; and in starboarding his helm and changing his course to port, while the vessels were rapidly approaching each other with the "Gualala" a little on his starboard bow, and without announcing this change of course to the "Gualala" in any way.*

To consider properly the different parts of this proposition, we turn to certain fixed principles in the law of navigation. The one that leads all the rest, and which the courts have repeated to deaf ears with almost tiresome iteration, is: At sea, eternal vigilance is the price of safety. In the words of the International Rules of the Road it is expressed thus:

> "Art. 29. Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof, from the consequences of any neglect * * * to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."
>
> 26 Stat. L. 328.

The other provisions of these rules are:

> "Art. 19. When two steam vessels are crossing, so as to involve risk of collision, the vessel

which has the other on her own starboard side shall keep out of the way of the other."

26 Stat. L. 327.

"Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

26 Stat. L. 327.

The testimony of McAlpine and of Hansen, in connection with these rules, convict the "Argyle" of the primary causative faults above set out.

The testimony of Lookout Hansen is most decidedly pointed. He says:

"It was *just after* I had seen the 'Gualala' when she blew that one whistle. It was just an instant afterward. She was about three ship's lengths away when she blew that one whistle."

That is damning evidence. But it must, in frankness, be said that in a case of this kind all estimates of time and of distance are unreliable, and must be tested by the ascertained facts. Where, though, is the court to go in order to determine when the "Gualala" was *first* observed from the "Argyle"? Of necessity, from Hansen to the discredited McAlpine, who says:

"The first I saw of the 'Gualala' she was then about inside of a mile."

Making due allowance for uncertainty in the estimate of this distance (and it seems likely that he would overestimate, rather than underestimate this

particular one) we have the "Gualala" *first* sighted at less than one-fifth of the distance at which her white masthead light should have been sighted. In other words, a vessel, loaded with a cargo that has been characterized by her witnesses as making her dangerous in the extreme in certain circumstances; and which vessel, her own witnesses say, is sluggish at first in responding to her helm, and takes 3 or 4 or 7 or 8 minutes to stop when going 8 knots—this vessel, going 8 knots an hour, allows, on a clear night, another vessel, also going 8 knots an hour, to approach within less than a mile without being sighted. The two vessels approaching each other at the rate of 16 knots would cover a mile in less than 4 minutes, or in about the same time, or less, than this death-dealing and self-dangerous instrument of commerce could probably be stopped. Here is negligence enough, particularly when taken in connection with what the Supreme Court says *(infra)* about the timeliness of precautions. But the court must go to McAlpine again. He says the vessels were on parallel courses and therefore there was no danger. He also says:

> "There was a slight alteration in the bearing of the 'Gualala' between the time I first saw her 1½ points off my starboard bow until her first whistle. One and a half minutes after and when her red light was reported she only changed her bearing ½ a point." (His log shows he had ported ½ a point.)
>
> (Upon the subject of change of bearings the court is referred to: Note to International Rules, 26 Stat. L. 326; 112 Fed. 161; 199 Fed. 302.)

If McAlpine's testimony upon this point be true, then he was or should have been plainly advised before the 'Gualala" blew one whistle that there was risk of collision; he was or should have been also thereby plainly advised that the vessels *were not on parallel courses.*

So, according to McAlpine, there was only a slight alteration in bearing from the time the "Gualala's" light was first sighted until just before the one whistle. And Comstedt, the lookout on the "Gualala" says that until the one whistle was blown on the "Gualala", the "Argyle" didn't change her position as to the bearing she was off the "Gualala's" port bow. Yet in the circumstances, with the "Argyle" changing her course to port under a starboard helm and keeping the "Gualala" on practically the same bearing, as soon as the "Gualala" blew one whistle the "Argyle" answered with one!

It is, of course, a matter of common knowledge that if the two vessels had been approaching each other on parallel courses at the rate of 8 knots, or 16 knots, the angle at which the "Gualala's" light would be seen from the "Argyle" *would increase rapidly.*

It is interesting in this connection to note that if the "Gualala's" light was *first* sighted 1½ points off the starboard bow of the "Argyle" and the "Gualala" was then off to starboard of the "Argyle" 2½ ship's lengths or 800 feet (the

average between McAlpine's 2 or 3 ship's lengths), then the "Gualala's" light could not, as a matter of mathematics, have been more than 2659 feet or .45 of a knot away from the "Argyle" when it was *first* sighted. This is determined by the solution of the right angle triangle:

$$\text{tangent } 16^\circ\ 45' = \frac{800}{x}$$

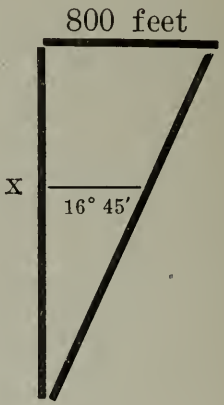
$$\text{logarithm } x = \text{logarithm } 800 - \text{logtan } 16^\circ\ 45'$$

$$800 \text{ log.} = 2.90309$$

$$\text{logtan } .16^\circ\ 45' = 9.47852$$

$$\log x = 3.42457$$

$$x = 2658.1 \text{ feet}$$



Of course, all due allowance must be made for this data being estimated data; but making such allowance, it hardly seems necessary to add anything further to show that there was lack of vigilance on the part of the "Argyle"; that such lack was a vital primary causative fault.

It is equally clear that the "Gualala" was not on a course parallel with that of the "Argyle's", and that it was primary causative fault for McAlpine to proceed on the theory that the courses were parallel.

McAlpine's oral estimate of 5 or 6 minutes between the collision and the time when the "Gualala" was first sighted and the log statement of 8 minutes

for that elapsed time still further clinch the above propositions; as it not even claimed that the "Argyle" was either slowed, stopped or reversed until after the one whistle, and the greater the elapsed time between first sighting the "Gualala" and the one whistle signals, the more glaring became the faults.

These were the primary causative faults of the "Argyle" before any maneuver whatsoever on the part of the "Gualala".

The "Argyle's" other primary causative faults are, in the order of their occurrence:

(1) *Hansen failed to report to McAlpine when the "Gualala's" green light and her red light were visible together.*

(2) *Hansen failed to report to McAlpine when Hansen lost sight of the green light and the red light only of the "Gualala" remained visible.*

(3) *The "Argyle" failed to slacken her speed or stop or reverse as soon as the red light and the green light of the "Gualala" became visible.*

(4) *The "Argyle" failed to slacken her speed or stop or reverse at once after the green light disappeared.*

These may, for the purposes of the argument, be considered together, and also with the rules of the road above stated, in connection with the testi-

mony of McAlpine and Hansen. We give the pertinent cases before proceeding to make any comment. They follow:

> "There is 'risk of collision' whenever it is not clearly safe to go on."
>
> The Philadelphia, 199 Fed. 302.

> "Precautions must be seasonable in order to be effectual, and if they are not so, and a collision ensues in consequence of the delay, it is no defense to allege and prove that nothing could be done at the moment to prevent the disaster, or to allege and prove that the necessity for precautionary measures was not perceived until it was too late to render them availing. Inability to avoid a collision usually exists at the moment it occurs, but it is generally an easy matter, as in this case, to trace the cause to some antecedent omission of duty on the part of one or both of the colliding vessels."
>
> Sieward v. The Teutonia, 23 L. Ed. 46-47.

> "Errors committed by one of two vessels approaching each other from opposite directions do not excuse the other from adopting every proper precaution required by the special circumstances of the case to prevent a collision; as the Act of Congress provides that, in obeying and construing the prescribed rules of navigation, due regard must be had to the special circumstances rendering a departure from them necessary in order to avoid immediate danger."
>
> Miner v. The Sunnyside, 23 L. Ed. 304.

> "Argument to show that nothing could have been done at that moment to avoid the collision is quite unnecessary, as the proposition is self-evident; but the fault consists in getting the two vessels into that dangerous situation. Pre-

cautions in such cases must be seasonable in order to be effectual; and if they are not so, and a collision ensues in consequence of such delay, it is no defense to allege and prove that nothing more could be done at the moment to prevent it and prove that the necessity for precautionary measures was not perceived until it was too late to render them availing.

"Inability to do anything effectual to prevent a collision at the moment it occurs, usually exists; but it seldom happens that there is much difficulty in tracing the cause which produced it to some antecedent neglect, carelessness or unskillfulness in those having the command of one or both of the vessels."

The America v. Cam. and R. R. Trans. Co., 23 L. Ed. 726.

"It frequently happens in cases of collision that the master of the vessel could not have prevented the accident at the moment it occurred; but this will not excuse him, if, by, timely measures of precaution, the danger could have been avoided."

The Syracuse v. Langley, 20 L. ed. 384.

"Her officers failed conspicuously to see what they ought to have seen or hear what they ought to have heard. This, unexplained, is conclusive evidence of a defective lookout."

The New York, 44 L. ed. 134.

"The rule of navigation applicable to approaching vessels depends upon the actual situation of the vessels *at the time when the necessity for precaution begins.* Everything prior to that is immaterial, except as it may give each some knowledge of the other's intention."

The Aurania and the Republic, 29 Fed. 99.

"Considering the great interest of life and property at stake, a reasonable provision for safety against unexpected contingencies, and even against slight mistakes or errors in the navigation of either vessel, is plainly obligatory. No rational judgment, as it seems to me, can hesitate to pronounce it to be an unwarrantable risk to calculate so closely on one's course that a momentary mistake or misapprehension of an order, or a brief and slight error on the part of either vessel, or a small unforeseen deflection from, an unexpected cause would be past all remedy and involve inevitable collision."

The Aurania and The Republic, 29 Fed. 124.

"His fault was that which I have had so frequent occasion to comment upon, namely, not allowing a sufficient margin for safety, amid the contingencies of navigation, and not taking in time the decisive measures at his easy command. The Laura v. Rose, 28 Fed. Rep. 104; The Aurania, 29 Fed. Rep. 98. As I must find that the master had sufficient time and space to keep out of the way, had he acted with the promptness and decision that reasonable prudence demanded, and as there was no other vessel that prevented his doing so, the Kelsey must be found in fault."

Wells v. Armstrong, 29 Fed. 218.

"Therefore, not only was the tug clearly in fault in the matter of a lookout, but the ordinary rule is applicable that, independently of the question whether or not the want of a lookout contributes to a collision, the fact of negligence in that respect, whenever there is a dispute like this at bar, necessarily preponderates with great force against the vessel deficient in that respect, in weighing proofs pro and con, unless they are capable of being recon-

ciled. This practical rule is only an application of the facts that the best disposed persons are prone to imagine theories to excuse the results of their own oversights, and that on the high seas the rapid occurrence of events, in connection with the approach of two colliding vessels at night, naturally leaves confusion in the minds of those who fail to maintain proper vigilance and a state of preparation, and who are, therefore, surprised by unexpected, sudden catastrophes. Taking the facts with reference to the lack of a proper lookout on the part of the tug, in connection with the allegation of libel that, when the green light of the schooner was sighted, the tug was too far ahead to starboard her wheel and go across the stern of the Dillaway, we cannot escape the conclusion that the tug was at fault."

The Samuel Dillaway, 98 Fed. 142.

"Rules of navigation, such as have been mentioned, are obligatory upon vessels approaching each other, *from the time the necessity for precaution begins,* and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain."

U. S. Mail Steamship Co. v. Rumball, 16 L. Ed. 148.

"The master also seeks to excuse himself by alleging that the Argo was so constructed that her headway could not have been stopped in time to be of any service. This may be true, and yet the Dumois should not be held responsible for the faulty construction of the Argo in this particular. While a steamer may be so built as to attain the utmost possible speed, she ought also to be provided with such means of stopping or changing her course as are commensurate with her great speed; and the very

fact of her being so fast and apparently uncontrollable is an additional reason for the greater caution of her navigation. Her increase of speed should have been obtained with as little increase of risk to other vessels as was possible, and if any precautions in that direction were neglected, it was a fault for which she alone ought to be called upon to respond. This court has repeatedly held the fault, and even the gross fault of one vessel, does not absolve the other from the use of such precautions as good judgment and accomplished seamanship require."

The Albert Dumois, 44 L. ed. 759.

"It is as clearly the duty of the officer of the deck, after a light is reported, to keep it in view and to watch its movements, and the effect of the movements of his own vessel taken with reference to it, as it is of the lookout to see and report a light that comes in view. The Star of Scotia, 2 Fed. Rep. 592."

The Pangussett, 9 Fed. 118.

"The second mate of the Star of Scotia, who was the officer responsible for the navigation, testifies that, when the red light apepared, it bore about two and a half to three points on his port bow. He testified, also, several times, with great positiveness, that it ranged with or a little abaft the port fore rigging, as he stood on the weather or port side of the wheel. This would be less than half a point. It is clear that if the latter statement be true the light was not brought well or safely on the port bow. Having brought the light on his port bow, so far as in his judgment made it safe to steady the wheel, and having given the order to steady, it was then his duty to watch the light as the two vessels approached. If his calculation was right, and he was safely to leeward, the red light,

provided the other vessel kept her course, *would have constantly broadened on the bow;* yet his testimony as to the movement of the light after it was first seen is very confused. He does not testify that it broadened at all on his bow. On the contrary, he always put it as ranging with the fore rigging, and he puts it there when it suddenly changed to green, and the other vessel was found under his bow. Yet, *if it did not broaden, he should have noticed it, and should not have been taken by surprise, as he was, by its sudden change to green.*"

Mircovich v. Bark Star of Scotia, 2 Fed. 592.

"The lookout on the Hansa failed to do his duty. He did not report the Transporter when he discovered her, on the ground, as he alleges, that he supposed the captain and pilot then saw her. This, of itself, was great negligence on his part. Nothing, under such circumstances, should be left to conjecture. He should have reported the steamer at once, and it is possible that his failure to do so may have prevented the Hansa from changing her course, as she otherwise would, or at least might have done."

The Hansa, 11 Fed. 451.

"Respondent's own testimony shows beyond controversy that the pilot, when notified by the lookout that there was a light ahead, went forward and looked at it for several minutes, and then went aft, saying the approaching vessel was going all right. Beyond question he ought to have observed that there was a necessity for precaution, as the lookout does not pretend that the brig would have passed to the leeward more than her length if she had kept her course. The distance of the vessels apart when the brig ported her helm was at least one hundred and

fifty yards, *and it is not doubted that if the pilot had continued to watch her course as he should have done, the collision would have been prevented.* Instead of doing so, however, he turned round and walked aft, virtually leaving the matter in charge of the lookout. He gave the order 'hard up', but it was too late to prevent the disaster. The excuse offered for the pilot is, that he had a right to keep his course; but rules of navigation were framed and designed to save life and property, and not for the purpose of promoting collisions. Such were the views of the supreme court long prior to the enactment of the steering and sailing rules, which expressly provide that nothing therein contained, shall exonerate any ship from the consequences of the neglect of any precaution required by the ordinary practice of seamen, or by the special circumstances of the case."

Lane v. The A. Denike, 14 Fed. Cas., pp. 1074-1075.

"Vigilance as well as experience is required of a lookout; and, if he is inattentive to his duty, it is no sufficient excuse to say that he was competent to perform the required service. No doubt the bark had a lookout; and the evidence tends to prove that he was competent; but his own testimony shows conclusively that he did not properly perform his duty after the mate came forward and returned aft. He admits that he could not tell whether, at that time, the steam tug was stationary or in motion; and he must have known that the mate left the forecastle and went aft as ignorant upon the subject as he himself was.

"Suppose that was so, and there is no apparent reason to doubt it, then it was his plain duty, the moment he ascertained that the lights ahead were stationary, to have reported that

fact to the mate as the officer of the deck. Steamers in motion, the mate might think, would take care of themselves; but *the lookout could not know what the mate would think if he should be informed that the lights were stationary.*

"Lookouts, as he supposes, are not required to report the same light a second time, though he admits it might become the duty of a lookout to do so in case the circumstances were materially changed. *He did not make a second report in season to be of any avail,* except, perhaps, to arouse the mate to a consciousness of his prior neglect in not making some effort to ascertain whether the lights ahead were stationary or in motion. *"Whether a second report before the collision became inevitable would have dispelled the feeling of security manifested by the mate cannot be known; but it is clear that no such second report was made in season to enable the mate to adopt any effectual precaution whatever.*

"Culpable misconception as to his duty on the part of the mate, and inattention and carelessness on the part of the lookout, induced, perhaps, by the remarks of the mate that it was a steamer and that she would take care of herself, *were the primary causes of the neglect and omission of duty which led to the collision."*

Miner v. The Sunnyside, 91 U. S. 208.

"An error in extremis cannot be urged in exculpation of a vessel whose prior negligence has brought about the situation in which a mistake in judgment is excusable."

The Protector, 113 Fed. 868.

"Where one vessel is in fault sufficient to cause the collision, there is a presumption in

favor of the other vessel which can only be rebutted by clear proof of contributory fault."

The Oregon, 39 L. Ed. 914.

"This court has repeatedly held, following the Supreme Court, that a vessel which is primarily in fault for a collision cannot shift its consequences in part upon another vessel without clear proof of the contributing negligence or fault of the latter. Her own negligence sufficiently accounts for the disaster."

The Chicago, 125 Fed. 715-16.

"When a vessel has committed a positive breach of the statute, she must show, not only that probably her fault did not contribute to the disaster, but that it could not have done so. Belden v. Chase, 37 L. Ed. 1218. The Beaconsfield, 38 L. Ed. 661."

The Oregon, 39 L. Ed. 914.

Yet in the face of the law and the facts, counsel for appellant puts into cold type what he urged upon the court below, to wit (Br. 38, 39, 40):

"Hansen, the lookout, testified that he saw the mast headlight and immediately afterward the green light, at what he estimated to be three or four ship lengths off, a point and a half or two points on the starboard bow, both of which lights were immediately reported to the bridge (Ap. 119-22). The fact that the lights were not seen a greater distance off did not indicate want of diligence, for it may have been due to atmospheric conditions, of which there was at least some evidence from both vessels (Ap. 110-20, 259-6). Surely the foregoing shows a proper performance of the lookout's duty.

"What then happened? The 'Gualala' blew one whistle which was immediately answered, a fact established by a concurrence of testimony

from both vessels (Ap. 121-2, 262). What could that have meant to him, or to any lookout, other than that the presence and the intended change of course by the 'Gualala' were known to the bridge officer of his own vessel? Did his failure, then, to report a change of course, and a whistle showing such alteration, which was, on the admission of the 'Gualala's' witnesses, immediately answered, contribute to the collision? Most certainly not. And then what? What maneuver did the one whistle of the 'Gualala' indicate she intended making? Hansen knew, and any other seafaring man would have known, that it meant a porting of helm, and that such a change of course on the 'Gualala's' part would expose both her lights for an instant, and then shut out her green light and leave alone the red light. He knew from the answering of the whistle by the 'Argyle' that the bridge officer of the latter was alive to the proposed change of course, and its effect upon the 'Gualala's' lights (Ap. 131-32). Can he then be said to have been negligent and inefficient in not reporting both lights, the disappearance of the green, and then the red light alone, when he knew that his bridge officer was advised as to the situation? We submit not."

When the above was written, counsel for claimant was not ignorant of the fact that Hansen could *not* have known anything of the kind. Even had Hansen been a divine mind reader, he could not have known what was not so. Counsel knows that McAlpine testified time and again that he (McAlpine) *never, at any time,* saw the "Gualala's" red light until AFTER "Gualala's" one whistle was blown (see McAlpine's testimony as follows):

Shortly after (sighting the 'Gualala's' green light) he (the 'Gualala') blew one whistle and

> ported his helm and *then* I saw his red light. I did *not* see the 'Gualala's' red light *at any time prior to the receipt of her* one whistle. Saw the red light almost immediately after the receipt of that whistle. When the one whistle was blown I saw her red light *for the first time.* I do not know how long that red light may have been in view before the 'Gualala' blew this whistle (Ap. 53-68).

So, *before* McAlpine saw the "Gualala's" red light, the "Gualala" had changed her course sufficiently to starboard under her port helm to open up her red light, so that both the red and the green were visible at the same time; the "Gualala" had, also, then turned still more to starboard, shutting out her green light and leaving only the red; and *after* that and *after* McAlpine heard the one whistle, McAlpine saw the red light and answered one whistle with one, nor did he know how long that red light had been been visible when he heard the one whistle.

In the face of this testimony, how in the name of common sense, could Hansen know that McAlpine was advised that the "Gualala" "would expose both her lights for an instant, and then shut out her green and leave alone the red light", when McAlpine knew nothing of what was going on?

As Josh Billings truly said, " 'Taint ignorance that does so much harm in this world; it's knowin' so many things that ain't so."

Hansen never reported both lights together; he never reported the red light; McAlpine never saw

both lights together; he saw the red light *after* the "Gualala" blew one whistle.

In the case of the Livingstone, 113 Fed. 882, the change of course had not begun when the whistle was blown.

Claimant rests its case on still another alleged fact that is not a fact; and which, in one form or another, is repeated time and again by counsel for claimant. That is the statement that the "Argyle" was reversed full speed astern *immediately* after answering the "Gualala's" one whistle with one.

The "Argyle" is bound by her own logs (The Utopia, 1 Fed. 913); she cannot get away from them. *By her logs, one minute elapsed from the time that the "Argyle" gave one whistle until the signal to reverse was given.* In addition, the man at her wheel "guessed" that this time was one minute. He, more than any one else on the "Argyle", was in a position, in the wheelhouse, best suited to keeping a sense of proportion in the midst of the confusion incident to an imminent collision. By the pilot house log and the ship's log, the "Argyle" blew one whistle at 3:05; by the engineer's log the signal for full speed astern was given at 3:06. And here, too, was double fault on the "Argyle's" part:

1. In not knowing when both side lights became visible at the same time to Hansen and in not reversing and giving three blasts as soon as they were both visible.

2. In not reversing and giving three blasts as soon as McAlpine discovered the red light, if he then thought there was danger, instead of answering with one whistle and one minute thereafter reversing.

It is as certain as anything can be that if McAlpine had not been guilty of these faults, both Latz and Abrahamsen would now be able bodied seamen, instead of objects of charity.

Above are outlined the primary faults that caused the collision. The first of these, and the most important, was practically untouched by claimant. Why was this? All of the testimony in regard thereto comes from his own logs and his own witnesses. Any seeker after primary causative faults would not have had to go further; would not have needed to plot or diagram with hypothetical questions for basis, if the real object was to aid the court. We shall, therefore, look somewhat further into this testimony upon two other points.

The "Argyle's" log books show that it was eight minutes from the time any light was first sighted on the "Gualala" until the time of the collision, and six minutes from the time of this first sighting until the "Gualala" blew one whistle. During that six minutes, the "Argyle" kept changing or changed her course to port sufficiently to keep the lights of the "Gualala" on practically the same bearing, although the vessels were approaching at the rate of 16 knots an hour; during that time no two-whistle

signal was given by the "Argyle" to indicate that she was directing her course to port; there was no slowing or stopping or reversing or three whistles to change a situation charged with danger. Can it be said the "Argyle" was not neglecting the precautions required by the ordinary practice of seamen, or by the special circumstances of the case, or article 18?

If, then, anything like the time stated in the log book elapsed, the "Argyle's" primary faults began long before the "Gualala" blew one whistle. Those faults were the violating of articles 29 and 18, which latter reads as follows:

> "Art. 18. Every steamship when approaching another ship, *so as to involve risk of collision, shall* slacken her speed, or stop and reverse, if necessary."

If, on the other hand, we accept Hansen at claimant's valuation, then claimant is worse off. Claimant says Hansen saw the lights as soon as they could be seen; that the fact they were not seen sooner "may have been due to the atmospheric conditions". Suppose this were so. It only proves that the fire is a bit hotter than the frying pan. If it were so, what business had a vessel, that required from 4 to 8 minutes to stop her, to go driving through the water at 8 knots an hour under atmospheric conditions that made it impossible for a vigilant and efficient lookout to sight the lights of another vessel before they were within 2659 feet of her? Hansen

says the distance was about 1280 feet, and we have shown that if the light was 1½ points on the starboard bow and 800 feet to starboard at right angles, it must have been 2659 feet away. So, giving all the benefit to the "Argyle", we have this vessel, hard to stop, sluggish in steering (slow to start and hard to check), going ahead at 8 knots an hour under atmospheric conditions that made it impossible for a vigilant and efficient lookout to sight a masthead light until it was within a distance of from ¼ to ½ a knot, a light that should have been visible on a dark night with a clear atmosphere at a distance of five miles. Could there be plainer violation of the rule requiring that

> "Art. 16. Every vessel shall, in a fog, *mist,* falling snow, or heavy rainstorms, go at a moderate speed, *having careful regard to the existing circumstances and conditions?"*

The faults above enumerated do not require any consideration of theories or of expert testimony. They are primary faults established by the "Argyle" herself, *before the "Gualala" ever blew one whistle.*

Claimant's effort to show that the primary fault was the "Gualala's" porting not only ignores all of the "Argyle's" preceding faults, but is predicated and rests solely upon the statement that the "Argyle" reversed immediately upon hearing that whistle. We have seen that the fact is just the opposite. Therefore, the "Argyle's" excuse *is* the old "stereotyped excuse".

Whatever McAlpine says, the "Argyle's" logs show that he was satisfied there was plenty of room; that he acquiesced by answering with one whistle and by putting his helm from starboard to port and continuing at full speed for one minute.

Considering the above, there remains no loophole through which the "Argyle" can escape guilt for primary causative faults.

The circumstances required that a vigilant look-out should have sighted the "Gualala" long before she was sighted; that after she was sighted, and her bearing failed to change appreciably that the "Argyle" should have realized that the "risk of collision" existed and should at once have reversed. If she had done this no collision would have resulted.

Further, McAlpine should have seen the green light and the red light at the instant that they became visible together and, also, Hansen should have reported to McAlpine the instant these two lights became visible together (instead of never reporting them). At the instant these two lights were visible together, McAlpine should have reversed full speed astern. Had he done so, and ported his helm at the same instant, the collision could not have occurred, for his vessel would have swung to starboard and would necessarily have cleared the "Gualala". It was nearly an "end on" collision. Just a little more to the right, and what a difference to Latz and Abrahamsen! The "Argyle" cannot show that these faults probably did not cause the collision, nor that

they could not have caused it, for they were causative, each and every one of them. Nobody can tell with accuracy how long it was between the time when these two lights were visible and the time when the signal to reverse was given. McAlpine says that after seeing the green light he took 2 or 3 turns up and down the bridge (a distance across the ship of 60 or 120 feet) and *shortly after* he (the "Gualala") blew one whistle which he (McAlpine) answered with one. The time that it took to walk this distance, plus the "shortly after", is one of the things that caused Latz and Abrahamsen to be lamed for life.

The fault of Hansen in not reporting instantly the change from the green and the red together to the red alone is the same fault, with the time element lessened.

Claimant's theory of the collision, as set out in its answer, is that the two vessels had theretofore been approaching safely green to green, and the "Gualala" then deliberately departed from a safe course, put her helm to port and ran across the bow of the "Argyle", making a collision inevitable. That is not an unusual theory resorted to by the vessel in fault. Of it this court says:

> "In Haney v. Baltimore Steam Packet Co., 23 How. 287, 291, 16 L. Ed. 562, which was a case in admiralty, where the question raised was very similar to the case in hand, the answer admitted the collision, and the result of it, and it also admitted that the schooner

was seen at a distance of 2 or 3 miles; that the steamer was proceeding at a rate of 14 miles an hour, heading due north; and the schooner holding her course nearly due south; but it alleged as an excuse that, while the steamboat, and schooner were meeting on parallel lines, the schooner suddenly changed her course and ran under the bows of the steamer. The court said: 'This is the stereotyped excuse usually resorted to for the purpose of justifying a careless collision. It is always improbable and generally false.' "

The Dauntless, 129 Fed. 721.

THE EXCHANGE OF ONE WHISTLE.

The one whistle from the "Gualala" meant "I am directing my course to starboard". If the "Argyle" considered the maneuver unsafe, she should not have answered with one whistle; but should at once have reversed her engines and given three blasts of her whistle. That duty was all the more imperative, if McAlpine then regarded a collision as inevitable; for he could not know how easy or how difficult it was to handle the "Gualala", whose identity was then unknown to him. His blowing one whistle gave the "Gualala" no clew to his alleged conviction that a collision was then inevitable; just the opposite. By answering with one whistle, he plainly announced to the "Gualala", "I, too, am directing my course to starboard"; and it was only after he blew the three whistles, which were not heard on the "Gualala", that the

"Gualala" might have known that any other maneuver was contemplated. Further he had no such conviction, for it is the testimony of the wheelman on the "Argyle" that, "I guess about 1 minute elapsed between the one whistle and the three whistles"; and this is backed up by the "Argyle's" log books, the ship's and the engineer's log. So evidently there was a minute or about that, from the time the one whistle was blown until the "Argyle's" engines were reversed, and McAlpine could not have regarded the collision inevitable when he blew one whistle: if he did, his fault was the greater for not giving three blasts and reversing immediately.

The case of The Lisbonense, 53 Fed. 300, is the case that best fits this exchange of whistles. We quote:

> "The initiative was taken by the Lisbonense, which sounded a one-blast whistle. Under the situation as she understood it, her duty was plain,—she was to keep her course. The international rules have provided for no signal whereby a vessel which intends to hold her course shall notify another of that intention. Article 19 provides as follows:
>
> " 'In taking any course authorized or required by these regulations, a steamship under way may indicate that course to any other ship which she has in sight by the following signals on her steam whistle, namely: One short blast to mean, "I am directing my course to starboard;" two short blasts to mean, "I am directing my course to port;" three short blasts to mean, "I am going full speed astern." The use of these signals is optional, but if they

are used the course of the ship must be in accordance with the signal made' " (p. 298).

"In this particular case, however, both sides concede that the manoeuvers attending the collision were had in waters where the international rules control" (p. 299).

"Had she directed her course to starboard the collision would not have happened; and while we cannot hold her in fault for not doing so, under the special circumstances, we are of the opinion that, knowing of their existence, she was in fault for announcing to a vessel not possessed of the same knowledge, a change of course which she could not carry out" (p. 300).

"The Lisbonense, receiving such an answer to her own whistle, was entitled to assume that the vessel giving it was not so affected by special circumstances that she could not manoeuvre so as to keep out of the way of the Lisbonense by directing her course to starboard. Even in the sense in which the signals were interpreted by both pilots, La Champagne's signal whistle was a promise not to interfere with the Lisbonense crossing her bows, whether by changing her own course to starboard or by checking her speed. * * * When he received the one-blast signal from the Lisbonense he had the option either to answer with two blasts, to keep silent, or to answer, as he did, with one. In the first case he would have distinctly advised the Lisbonense that, despite article 16, he considered the situation such that La Champagne could not keep out of her way; that he did not intend to do so by going to starboard; on the contrary, that he was going to sheer to port,—and thereafter the navigator of the Lisbonense would be charged with knowledge that La Champagne claimed to be navigating under the special circumstance rule, and expected

him to keep out of her way. Had La Champagne kept silent, the Lisbonense would at least have been warned by that circumstance that there was some uncertainty as to what the former intended to do. By answering with one blast she announced her intention to do the very thing she could not do. This was a fault. 'Courtesy' might require an answer to a signal, but certainly it did not call for an answer which, under the rules, governing her navigation, promised a manoeuvre which special circumstances forbade her carrying out" (p. 301).

APPELLANT'S CASES DISTINGUISHED.

Only a brief review is required of the cases cited by claimant, because they are not founded upon facts similar to those in this case:

In the case of the "Ping-On", the tug and her tow (the "Condor") first sighted the "Ping-On" from half a mile to a mile away, from 2 to 2½ points on her starboard bow; the tug and tow continued on a starboard helm; which was a course divergent from that of the "Ping-On", as indicated by the exposure of her green light. *It was soon perceived* by the tug and tow *that the steamer was changing her course.* The tug and tow, on perceiving this change of course, *blew two whistles to indicate that she was* (they were) *on her* (their) *starboard helm. To this signal the steamer replied by one whistle, indicating that she was porting* (11 Fed. 614 and 615). In other words, they crossed signals. The tug gave the signals she had

a right to give, and the "Ping-On" did not acquiesce, but answered with a signal she had no right to give.

In the "Roanoke" the sailing vessel, of course, gave no signal, but when very near changed her course across the bow of the "Roanoke"; the "Roanoke" had already slowed, and the engines were backed as soon as possible.

In the case of the "Eagle Wing" (two sailing vessels) there was no question about the fact that the "Eagle Wing" when nearly abreast of the "Hargraves'" bow suddenly shut in her own red light, showed her green for a few seconds, and ran into the "Hargraves" (p. 830).

In the case of the "Atlantic City", when the two vessels were not over half a mile apart, green to green, each gave a signal of two whistles, which neither heard. When they were probably not more than 300 feet apart, the "Glen" suddenly ported and sheered across the "Atlantic City's" bow. The "Atlantic City" at once stopped as soon as possible and reversed (143 Fed. 453). There was no question of acquiescing in signals.

In the case of the "Free State", the court says (23 L. ed. 301):

> "Observing that the scow was sailing in the direction mentioned, the steamer starboarded her helm, thus bearing to the east of south. On these courses there was no risk

> of collision with the scow: * * * the scow selected her course; and the steamer, acquiescing in that selection, took the suitable means to pass her in safety. * * * There was no risk of collision. * * * Subsequently, and when the vessels were within 300 feet of each other, and probably within three minutes of time, the scow changed her course and practically ran under the bows of the steamer. Then there was risk of collision, but not until then. *The steamer,* in this emergency, *did stop and reverse;* but the time was too short and the distance too small to prevent the catastrophe."

The "Manitoba" is strong in our favor and equally strong against the "Argyle" as the court's statement there shows (30 L. ed. 1098): The vessels were within from 400 to 500 feet of each other, the "Comet" being then from 200 to 300 feet on the starboard side of the "Manitoba", and if each had kept their respective courses, they would have passed without colliding; but the "Comet" then ported her wheel, displayed her red light, and suddenly sheered across the "Manitoba's" course. The "Manitoba" starboarded and the collision ensued. *Neither vessel sounded any signal of the whistle, indicating the side it intended or desired to take* * * * The "Comet's" intentions, in connection with all the surrounding facts, called for the closest watch, and the highest degree of diligence, on the part of both, with reference to the movements of the other; and it behooved those in charge of them to be prompt in availing themselves of any resource

to avoid, not only a collision, but the risk of such a catastrophe. * * * Each vessel misapprehended the purposes of the other. *It was this misapprehension on the part of said respective vessels, which might have been timely obviated by proper signals from either, that occasioned the collision.*

One of the "Argyle's" faults, like the fault of the "Khedive", was that she did not reverse immediately. That is all that need be said of the Stoomvort case.

The "Gualala" certainly knew that when her helm was put to port she would go to starboard. She also knew, after the "Argyle" answered, that the "Argyle" agreed to this maneuver. So the "Gualala" was under no misapprehension as to what she was doing or as to what the "Argyle" had agreed to. If the "Argyle" had answered with two whistles or with three, the "Gualala" might, under claimant's theory, then have gone forward with the maneuver at her own risk. In the circumstances, the risk was solely at the expense of the "Argyle". The "Gualala" knew nothing of the steering qualities of the "Argyle". The "Gualala" did not know that the approaching vessel was a leviathan of the deep, unwieldy, unhandy, hard to stop, dangerous to herself and to everybody else within a radius of at least half a mile. All that the "Gualala" knew or had to know was that the other vessel, knowing her own characteristics—limitations, defects, or abilities—agreed to the maneuver.

IV.

ALLEGED FAULTS OF "GUALALA".

The appellant cannot urge any of these alleged faults here, for the reasons following:

1. *There has been no assignment of errors in regard thereto, as heretofore pointed out.*

2. *The alleged faults were not urged in the court below, but are put forth here for the first time.*

3. *Appellant alleges in its answer (Ap. 15, 16) that the collision was due solely to the "Gualala" porting her helm and changing her course across the bow of the "Argyle" while the two vessels were on parallel courses, whereas the alleged faults are all based upon a period of time* "AFTER *he (the 'Gualala') first ported and gave the one blast passing signal" (Br. 50), which signal was answered at once by the "Argyle". In other words, the alleged faults relate to a period of time subsequent to the porting of the "Gualala's" helm and the alleged crossing of the "Argyle's" bow by the "Gualala", the only fault pleaded and pleaded as the sole cause of the collision.*

We think "1" and "3", as set out above, need no further comment; and as to "2" we wish to add only the following:

"The record does not show that any such objections were made in the court below at any time. The court never was called upon to decide this question. * * *

"In the present case it was not presented in any form or manner whatsoever in the court below, and cannot be considered by this court. Wasatch M. Co. v. Crescent M. Co., 140 U. S. 293, 298; 13 Sup. Ct. 600; 37 L. Ed. 454." Paauhau, etc. Co. v. Palapala, 127 Fed. 922. To the same effect Lloyd v. Preston, 146 U. S. 630.

LIBELANTS' CONCLUSIONS FROM ALL THE FACTS.

Controversy over the testimony of experts in this case would be more than futile, as there is in the record abundance of direct testimony from eye-witnesses to enable any court to find the necessary facts, without befogging its mind with theories of experts not based on all the facts. But we do wish to call the attention of the court to the remarkably fallacious manner in which appellant has evolved its theory.

It says that if Gibbs' testimony is not absolutely exact in all respects, the "Gualala" must have been guilty of primary causative fault. It ignores all the rest of the testimony in the case, including its own. It dwells insistently upon the fact that, at the time of the collision, Gibbs testified that the "Gualala" was headed S. SW. It ignores utterly and entirely the testimony of Carlson, the quartermaster at the wheel of the "Gualala", who had the compass in front of him all of

the time, and whose testimony upon this point was as follows (Ap. 340):

> "Q. Did you notice what course your vessel was heading at the time that the vessels came together?
>
> A. Yes, south southeast.
>
> Q. South southeast by your pilot house compass when they came together?
>
> A. Yes,—just at the time they struck why then we were heading south southwest at the time, that was only through the pushing of the one vessel against the other.
>
> Q. That was because the 'Argyle' pushed you farther around?
>
> A. Yes.
>
> Q. I mean just when they came together how were you heading before she pushed you around?
>
> A. That was south southeast."

It is fair to suppose, therefore, that just before the collision the "Gualala" was heading somewhere between S. SE. and S. SW.

Not only is that testimony ignored completely, but it is assumed as a hard and fast fact that the "Argyle" was sighted 1½ points off the port bow of the "Gualala". There is no more reason for making this assumption than there would be for assuming that it is a hard and fast fact that the "Gualala" was first sighted 1½ points off the starboard bow of the "Argyle". In fact, we feel sure the truth is somewhere in between. The court is governed by the undeniable and leading facts. It is not its province to find theories.

> "It is quite plain that the statements of the schooner as to both course and bearing cannot

> stand. Which one is to be rejected? Apparently the one which is most liable to error, and whose elimination will make the harmonizing of the remaining testimony easy * * * The testimony as to bearings is exposed not only to error resulting from imperfect memory, but also to error from careless and unskillful estimates. The witnesses testify from a recollection of an opinion formed by them, which opinion may not originally have been an accurate one."
>
> The Helen G. Moseley, 128 Fed. 406-7,

in which case the schooner was found to be without fault.

So here, libelants are not concerned with the absolute accuracy of courses or bearings, but with the undeniable facts to be gathered from *all* of the testimony, the laws of nature, and other surrounding circumstances. These will determine the manner in which the collision occurred. When *all* of the testimony on both sides is thus taken into consideration and carefully weighed, a theory can be evolved that will harmonize all of the material facts and be helpful to the court. We have tried to follow this method in developing

LIBELANTS' THEORY OF THE COLLISION.

Before outlining our theory, we wish to say it is made with the following considerations kept in view; very little reliance can be placed on estimates of times, distances and bearings, and neither ship will be condemned on those estimates alone (The

Great Republic, 23 L. Ed. 57); that it is impossible to estimate the bearing of a light at night closer than within a point, unless a compass bearing is taken (none was taken here); so that where the theory seems to demand it, colors and bearings must bend or give way to clearer-eyed facts.

Before any trouble began, the "Argyle" was steering NW. ½ W. and the "Gualala" SE. The range lights (the two white lights, one forward, one aft) of the "Argyle" were sighted from the "Gualala", bearing a little off the "Gualala's" port bow: nearly ahead; certainly less than 1½ points. The "Gualala", like all steam schooners when loaded, yaws or swings a good deal on each side of her course when steering, even in the best weather (see testimony of Younger Dickie and of Curtis). This, of course, would add to the other difficulties of determining with accuracy the bearing of any light from the "Gualala". These range lights of the "Argyle" were sighted by the "Gualala" 4 or 5 minutes before the collision. After seeing these range lights, the "Gualala" sighted the "Argyle's" red light practically right ahead, and would, without doubt, then have seen the "Argyle's" green or starboard side light at the same time but for the fact that there was a slight haze or mist along the "Argyle's" starboard side almost up to the "Argyle's" masthead light, and extending off toward the horizon on the "Argyle's" right. It is well known that the visibility of the green light is much more easily

affected than that of the red. The range lights of the "Argyle", until her red light was sighted, had remained nearly in line, so that the "Gualala" knew the "Argyle" was approaching practically head on.

The first light seen from the "Argyle" by McAlpine was the "Gualala's" green side light. The "Argyle" was much higher out of the water than the "Gualala" and the atmosphere over toward the "Gualala" was clearer; so the "Gualala's" white light should have been seen the regulation distance. It is demonstrable that when the green light was first sighted by McAlpine it was not 1½ points on the starboard bow, but at a very much more acute angle: or else it was such a short distance away from the "Argyle" that the failure to discover it earlier was criminal. To illustrate:

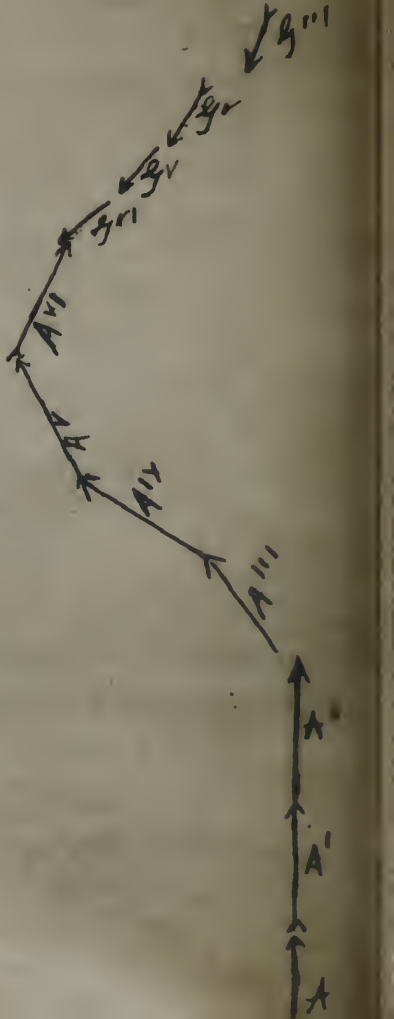
If this light was only a nautical mile away when first discovered and was then 800 feet off to the right at right angles with the "Argyle's" course, it would have been seen at an angle of 7° 30′ or ⅔ of a point off the "Argyle's" starboard bow. If it was seen 8 minutes before the collision, it then must have been about two miles away. This green light would, at a distance of two nautical miles away and 800 feet off to the right have been seen at an angle of 3° 45′ or ¼ of a point off the "Argyle's" starboard bow. (If the distance away was inside of a mile before the light was discovered, it might have been 1½ points on the starboard bow, but it would have

been criminal carelessness to let it get that near without discovering it and the white light earlier.)

So if the green light was sighted from the "Argyle" anywhere between 1 and 2 miles away and inside of 2½ ship's lengths off at right angles to the "Argyle's" course, then it must have been sighted from ¼ and ⅔ of a point off the "Argyle's" starboard bow. (In this connection, it must be added that nowhere in the testimony is there anything to indicate that the "Gualala" was, when first sighted, more than 2 or 3 ship's lengths to the right, and this distance would be decreasing slightly all of the time.) So between one and two miles away the angle would have been between ¼ and ⅔ of a point. It is a commonplace of observation that a man, standing on the starboard end of the "Argyle's" bridge would see a light that was really ½ or ¾ of a point on his port bow as if it were ahead or a little on his starboard bow; that if standing on the port end of this 40-foot bridge, he would see a light that was really ½ or ¾ of a point on his starboard bow as if it were ahead or a little on his port bow.

After the "Gualala" saw the "Argyle's" red light, the "Gualala" gave one whistle and ported her helm and began to swing to her own right. Before that, the "Argyle" had starboarded and had begun to swing to her own left under the influence of her starboard helm and swung much farther than the ½ point put down in the "Argyle's" log

= A. before he [illegible] lights were sighted.
= A. when G. sighted A's range lights.
= G. when A's range lights were sighted.
= G. when his green light was sighted by A.
= A. when she sighted G's green light.
= G. when she sighted A's red light.
= A. when G. sighted A's red light.
and A'' = A turning to port.
and A''' = A turning to starboard.
and G''' = G turning to starboard



book. She was sluggish in starting and hard to check; also, the "Gualala" had been kept on practically the same bearing up to the time of the first whistle. And McAlpine says that he did not at any time prior to the collision take any particular notice of the bearings or change in bearings of the "Gualala's" lights. As soon as the "Argyle" got the one whistle from the "Gualala", the "Argyle" shifted her helm to hard aport; but as she was swinging to her own port under the influence of her starboard helm, she had to counteract that influence before she started to come around to her own right under her port helm; and it was while she was coming around to the right under her port helm that she struck the "Gualala" (which was still swinging on her port helm) at an acute angle.

Of course no diagram can do more than give in the roughest sort of way an idea of the whole of the moving picture, showing from a time just prior to the first observation until the collision; but in a rough sort of way the different stages of the situations were as shown in diagram inserted opposite.

Summary.

It is submitted that the testimony of the log books and of those in charge of the "Argyle", without resort to experts, show the "Argyle's" faults to be as follows:

1. *The "Gualala's" lights were not seasonably sighted.*

2. *After a light was first sighted by the "Argyle" on the "Gualala", the "Argyle's" helm was put to starboard and the "Argyle" changed her course over to port. That even with this change to port, McAlpine kept the vessels on practically the same bearings from each other, although they were approaching at the rate of a little more than 16 knots an hour. To do this he must have been starboarding his helm.*

3. *After the "Gualala's" green light was sighted by Hansen and reported to McAlpine, Hansen did not report sighting the two side lights when both were visible together or the shutting in of the green light, leaving only the red light visible.*

4. *That McAlpine at no time saw the two side lights when both were visible together; at no time did he see the green light shut in.*

5. *That* AFTER *the green light came into view and after both side lights were visible together and* AFTER *the green light had been shut in and the red alone left visible and after the "Gualala" had blown one whistle, McAlpine* THEN, FOR THE FIRST TIME, SAW THE "GUALALA'S" RED LIGHT. *He did not know how long the two side lights were visible together, nor did he know how long*

the red side light alone was visible BEFORE *his attention was called to it by the "Gualala's" one whistle.*

6. *After the "Gualala's" one whistle was blown, McAlpine acquiesced therein by putting his helm to port and answering that whistle with one whistle, and then continued under full speed with his helm aport for a period of one minute.*

7. *That McAlpine did not slow, stop or back until one minute after answering one whistle with one. At no time did he give any alarm signal.*

If the atmospheric conditions were such that Hansen's testimony is to be taken, instead of the entries in the log books, deliberately made immediately after the accident, then the "Argyle's" case is this:

This vessel of great tonnage, sluggish in her steering—slow to answer here helm but swinging rapidly and with great momentum after she once began and therefore hard to check—this vessel, that could not be stopped in less than from 4 to 8 minutes, was driven through the water under such atmospheric conditions that she was unable to see the first light (admittedly in good condition and properly burning) until the two vessels were within from ¼ to ½ of a mile of each other.

We do not see how the testimony of all of the other witnesses on both vessels (as to the distance at which four lights were sighted) can be set aside, in favor of Hansen; but if it can be done, then the fault of the "Argyle" was both primary and criminal, for running, in all of the circumstances, at the rate of 8 knots an hour.

We respectfully submit that the faults of the "Argyle" are, upon claimant's own showing, obvious, primary and sufficient in themselves, to account for the collision; that she was solely in fault, and that the decree should stand.

Dated, San Francisco,
November 9, 1914.

F. R. WALL,
Proctor for Appellee, Latz.
S. T. HOGEVOLL,
Proctor for Appellee, Abrahamsen.